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No. 98-1579

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IN THE

Supreme Court of the United States

BMC INDUSTRIES, INC.,

Petitioner,

v.

BARTH INDUSTRIES, INC., Nesco, Inc., f/k/a Nesco Management, Inc., Barth Industries Co. Limited Partnership, BIC Corporation, Nesco Holdings, Inc., f/k/a Nesco, Inc.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

REPLY BRIEF FOR PETITIONER

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REPLY ARGUMENT

The focus of BMC's contention is the Eleventh Circuit's refusal to certify an unsettled question of Florida law, and that court's failure to do so has created intercircuit conflict on a significant UCC issue. Federal courts of appeals are somewhat circumscribed by the decisions of one another and therefore recognize that creating conflict among the circuits is undesirable. Specifically addressing this point in *Resolution Trust Corp. v. Chapman*, 29 F.3d 1120 (7th Cir. 1994), Judge Easterbrook observed:

> Even if we doubted the correctness of these holdings, which we do not, we would not think it prudent to create a conflict among the circuits.

Id. at 1222. To be sure, the Florida Supreme Court could eventually decide the UCC issue in favor of Barth. But that is not the point. Simply put, the Eleventh Circuit should not have been the court to create the conflict. Rather than yielding to the preferred course of certification, the Eleventh Circuit chose to preempt a cooperative federal and state judicial process adopted by Florida under its constitution, its statutes and its appellate rules. (Petition at 3-6) To say the least, certification is an important component of Florida and federal jurisprudence as this Court expressly recognized in *Lehman Bros. v. Schein*, 416 U.S. 386 (1977) and as recognized by the Florida Supreme Court in *Sun Insurance Office, Ltd. v. Clay*, 133 So.2d 735, 742 (Fla. 1961).

In *Sun Insurance*, the court explained that Florida constitutional and general law provide for the adoption of practice and procedural rules for the certification to the

Florida Supreme Court by federal appellate courts of "questions of state law determinative of a cause pending in federal court." *Id.* at 741. Referring specifically to the certification procedural rule, the court said:

> Its adoption was a valid exercise of our organic power and provided a procedure for assisting, *in a spirit of comity*, the Federal Appellate system in questions of state jurisprudence, no other forum for so doing having been established by the laws of Florida.
>
> * * *
>
> *It is now well established procedure for a federal court to abstain from deciding the merits of a case so as to afford the state courts a reasonable opportunity to construe a state statute involved in the case.* As stated in *Harrison v. N.A.A.C.P.*, 360 U.S. 167, 79 S. Ct. 1025, 1030, 3 L. Ed. 2d 1152.
>
> > *This now well-established procedure is aimed at the avoidance of unnecessary interference by the federal courts with proper and validly administered state concerns, a course so essential to the balanced working of our federal system.* To minimize the possibility of such interference a "scrupulous regard for the rightful independence of state governments . . . should at all times actuate the federal courts," *Matthews v. Rodgers*, 284 U.S. 521, 525, 52 S.

> Ct. 217, 219, 76 L. Ed. 447, as their "contribution . . . in furthering the harmonious relation between state and federal authority . . ." *Railroad Comm. Of Texas v. Pullman Co.*, 312 U.S. 496, 501, 61 S. Ct. 643, 645, 85 L. Ed. 971.
>
> *And statutes such as § 25.031 — enacted by the Florida Legislature "with rare foresight," [363 U.S. 207, 80 S. Ct. 1222, 1226] to borrow Mr. Justice Frankfurter's words describing its action in this respect — cannot help but contribute substantially to the salutary policy quoted above,* since such statutes would provide a vastly more expeditious method of securing an authoritative decision by the court of last resort of a state of a doubtful question of state law than does the declaratory judgment procedure, the route frequently followed in such cases. *See Harrison v. N.A.A.C.P., supra*; *Allegheny County v. Mashuda Co.*, 360 U.S. 185, 79 S. Ct. 1060, 3 L. Ed. 2d 1163; *cf. Meredith v. City of Winter Haven*, 320 U.S. 228, 64 S. Ct. 7, 88 L. Ed. 9.

Sun Insurance, 133 So.2d at 741-42 (emphasis added).

Commenting on less desirable practices followed *prior* to the availability of certification — where federal courts either would determine first impression questions on their own or abstain altogether — the Florida Supreme Court in *Mobil Oil Corp. v. Shevin*, 354 So.2d 372 (Fla. 1978), characterized the certification process as one initiated *expressly to permit doubtful questions of state law to be "referred directly to the highest state court for resolution."*

Id. at 376 (emphasis added). Relying specifically on *Lehman Bros.*, the court added that "[a]s a tool of federal-state comity, the certification process has been well-received, and is now used generously in the federal system where permitted by state law." *Id.*

Whether described as "cooperative judicial federalism" or "federal-state comity", the concept of certification reflects a policy judgment similar to Justice O'Connor's statement of policy regarding *stare decisis* in *State Oil Co. v. Khan*, 522 U.S. 3, 118 S. Ct. 275 (1997). "[I]n most matters it is more important that the applicable rule of law be settled than that it be right." *Id.*, 118 S. Ct. at 284. Thus, while this case presents a conflict between the Eleventh Circuit (per Judge Gerald Tjoflat) and the Seventh Circuit (per Chief Judge Richard Posner), BMC is not now asking for resolution of that conflict. Rather, it is urging this Court to order compliance with the policy underpinning of *Lehman Bros.* This Court deemed certification important enough to grant certiorari and render an opinion in *Lehman Bros.* calling for a *connection* between federal and state judiciaries even though they are sufficiently independent. Unfortunately, the Eleventh Circuit chose to go down its own path.

To justify the result below, Barth focuses on the Eleventh Circuit's reliance upon an intermediate Florida appellate court decision, *Linear Corp. v. Standard Hardware Co.*, 423 So.2d 966 (Fla. 1st DCA 1982), and contends that the Eleventh Circuit did not need to certify the question at issue because *Linear* "implicitly" decided the UCC question in favor of Barth. This statement is simply not true. An examination of the facts and holding of *Linear* discloses that the decision does not even address — much

less determine — the dispositive point. If anything, *Linear* can readily be interpreted to support BMC, consistent with *Wisconsin Knife Works v. Nat'l Metal Crafters*, 781 F.2d 1280 (7th Cir. 1986). The plain truth, however, is that either interpretation is a stretch because the case does not utter a word about reliance, as analyzed by Judge Posner. Procedures were in place to avoid the very problem which has now been created by the court's ruling. A jury verdict was overturned in the process and ten years worth of litigation will now start over from scratch.

In *Leavitt v. Jane L.*, 518 U.S. 137 (1996), this Court stated in no uncertain terms that it will not turn a "blind eye" to state law determinations which are far reaching in their impact, controversial, or perhaps even "plainly wrong." *Id.* at 144-45. In this case an interstate commercial transaction was structured between major corporations located in different states (Minnesota and Ohio) and different circuits (the Sixth and the Eighth). They contracted to do business in yet another state (Florida) situated in another federal circuit (the Eleventh), which is now at odds with two other circuits (the Fourth and Seventh) on a major issue of *uniform* law. Forty-nine states have adopted the UCC to simplify, clarify, and modernize the law governing commercial transactions, *and to make uniform the law among the various jurisdictions whose citizens do business with one another.* Uniform Commercial Code, § 1-102(2). Certification procedures exist to foster that purpose. That is precisely why the UCC issue should have been certified in this case.

CONCLUSION

Given Florida's proliferation as a center of global commerce, it should have been virtually *pro forma* for the Eleventh Circuit to permit Florida the opportunity to determine the UCC issue for itself. A more compelling case for certification in a civil context is hard to imagine. Fortunately it is not too late to correct the problem. It is still possible to send the issue to Florida. This Court is urged to order certification.

Respectfully submitted,

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